

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Policies Concerning	)	MM Docket No. 01-137
Multiple Ownership of Radio Broadcast	)	
Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

To: The Commission

**COMMENTS OF EURE COMMUNICATIONS, INC.**

Eure Communications, Inc. (“Eure”), by its counsel, hereby files its comments on the Notice of Proposed Rule Making and Further Notice of Proposed Rule Making, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets*, FCC 01-329, 66 Fed. Reg. 63997, published December 11, 2001 (“NPRM”). Eure is licensee of Radio Stations WINA(AM), WWWV(FM), and WQMZ(FM), Charlottesville, Virginia, and is currently a party in MM Docket No. 02-38, a proceeding in which the Commission designated for hearing an application for consent to assignment of license of WUMX(FM), Charlottesville, from Air Virginia, Inc. (“Air Virginia”), to Clear Channel Radio Licenses, Inc. (“Clear Channel”), in part due to a petition to deny Eure filed against the application.<sup>1</sup> In the case of WUMX, post merger, two parties in the Charlottesville radio market would control approximately 94% of the radio revenues.

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<sup>1</sup> The FCC’s News Release of March 19, 2002, noted that this is the first media assignment case to be set for hearing on concentration issues since 1969. As the issues in the NPRM bear directly on the outcome of the hearing, a copy of these Comments is being served on the presiding officer and counsel to the parties to MM Docket No. 02-38.

### **Policy on Time Brokerage and Sales Agreements**

At NPRM ¶¶ 79-83, the Commission discussed the treatment of Time Brokerage Agreements (“TBAs”), Joint Sales Agreements (“JSAs”) and Local Marketing Agreements (“LMAs”) and sought comment on the appropriate regulatory treatment of them. The Commission should take the competitive impact of TBAs and LMAs into account by continuing its policy of attributing brokered stations to their brokers. It is critical that the Commission treat the existence of an LMA or TBA as if the brokering station owned the brokered station. The Commission can rely on its enforcement authority to require termination of TBAs or LMAs that are contrary to the public interest because of their effect on competition. The same is true for JSAs since they have the same competitive impact as TBAs and LMAs in that they take the same revenue from the market. The Commission could require prior approval of LMAs or TBAs where the resulting revenue would exceed the 50/70 screen. Parties could bring these matters to the Commission’s attention in the form of complaints requesting dissolution of the arrangements.

### **Interim Policy**

At NPRM ¶¶ 84-89, the Commission established an interim policy that the Commission will apply to guide its actions in radio assignment and transfer of control applications pending a decision in this proceeding. The Commission stated that if an application proposes a radio station combination that would provide one station group with 50%, or two station groups with 70%, of the radio advertising revenue share of the relevant Arbitron metro market as reported by BIA Research, Inc. (“BIA”), the FCC’s staff will conduct a public interest analysis on several generic stated categories of

information. If, after completing its preliminary competitive analysis of the proposed transaction, the staff cannot grant an application, the staff will forward the application to the Commission with a recommendation that it be designated for hearing. The hearing designation order will afford the applicant with the opportunity to elect to have its application held pending completion of this rule making proceeding and have the outcome of the proceeding apply to its application. That is the case in MM Docket No. 02-38, the Charlottesville case referred to above to which Eure is a party. However, the Commission's NPRM does not explicitly cover the situation in Charlottesville where simultaneous with executing an asset purchase agreement, Air Virginia entered into a long-term TBA with Clear Channel for the program rights to WUMX. Since the effective date of that TBA, Clear Channel has been enjoying approximately 48.7% of the revenues in the market, about 18.3% of that revenue attributed to WUMX. Even though the FCC has presumptively found that a grant of the assignment application would not serve the public interest where approximately 94% of the radio revenues would be controlled by two companies post merger, unless the Commission causes the TBA to be terminated, this situation will continue until after final rules are made in this proceeding. Eure is requesting the Presiding Administrative Law Judge to terminate the TBA pending resolution of the hearing issues, but this should be a general policy of the Commission where parties enter into TBAs or LMAs the result of which would cause the combined revenue share of the brokering and brokered stations to exceed the Commission's "50/70 screen."

### **Arbitron Markets are More Realistic than the Current Method**

At NPRM ¶¶ 43-50, the Commission solicited comment on the relevant geographic market. Since the Commission's current use of mutually overlapping contours sometimes yields anomalous results, Eure believes that Arbitron markets are more realistic for the Commission's purposes of its competition analysis. In one example, WCYK(FM), Staunton, Virginia, has located its transmitter site on a mountain overlooking Charlottesville and moved its studios to Charlottesville. Using the city grade contour of WCYK, a Class B station, for a multiple ownership study results in 29 radio stations in the Charlottesville radio market. However, Arbitron shows only 10 stations in the Charlottesville market.<sup>2</sup> Part of this is due to the terrain in the vicinity of Charlottesville that works to restrict signals to those stations within a ring of hills surrounding the city. This terrain feature isolates the market from out-of-market signals.

Under the Commission's current method for defining radio markets, Charlottesville is in the second tier of radio markets; i.e., a market with 15-29 stations where one owner can be licensee of up to 6 stations, 4 of which can be in one service (AM or FM). However, if the Arbitron-derived number is used, Charlottesville is in the smallest tier of markets since there are fewer than 15 stations. In markets of that size, one owner can have no more than 5 stations, with no more than three in one service, and cannot hold over 50% of the stations in the radio market. Eure, therefore, would urge the

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<sup>2</sup> By letter dated November 15, 2001, the Commission's Audio Services Division wrote counsel for the parties requesting information for the record to "fully assess the transaction for its effects on the public interest." Attached to that letter is a table of station data for the Charlottesville market. It shows 10 stations in the market that generate revenue. They are WCHV(AM), WCYK(FM), WFFX(FM), WHITE(FM), WKAV(AM), WUMX(FM), WINA(AM), WQMZ(FM), WWWV(FM) and WUVA(FM). These are the same stations that appear in the Arbitron data.

Commission to use the Arbitron radio metropolitan area as the relevant geographic market to determine how many stations are in a radio market since it is a more reality-based form of measurement of the market. Additionally, revenue estimates such as those compiled by BIA should be used to make a determination as to whether a proposed merger will result in impermissible concentration. To be fair to broadcasters that have made investments in stations that would exceed the new limits, already granted applications for combinations that exceed these benchmarks should be grandfathered and those grandfathered rights should be assignable to future purchasers of the stations. Existing non-complying TBAs and LMAs not coupled to an already granted assignment application should not be grandfathered but should be subject to divestiture.

The Commission in this proceeding should strive to provide a “bright line” test wherever possible for the guidance of the public in the analysis of potential mergers and acquisitions. Practitioners and their clients who are assessing whether a potential merger will pass muster at the FCC are confronted by the imprecision of the application of the current multiple ownership rules. When a proposed transaction complies with the numerical limits of Section 73.3555 of the Rules, but a competitor raises possible concentration of revenue questions in the form of a petition to deny or informal objection, the transaction can be inordinately delayed. For example, applications<sup>3</sup> were filed June 25, 1998, when Eure attempted to merge with Charlottesville Broadcasting Corp. The proposed merger would have resulted in a combined number of stations below the Commission’s multiple ownership numerical limits (Total 5 stations – 3 AM and 2 FM). However, because of a petition to deny filed by Air Virginia and an inquiry by the U. S.

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<sup>3</sup> See File Nos. BAL-19980625GE-GG.

Department of Justice Antitrust Division, it was nearly two years later (June 13, 2000), before the FCC granted the applications-- and only after Eure agreed to divest two of the stations (to Clear Channel). A reliable bright line test would have avoided this delay and expense on the part of the Commission, the Justice Department, Eure and Charlottesville Broadcasting Corp.

Eure believes the dogmatic application of the current method of defining the radio market for a proposed merger has resulted in anomalous results. As noted above, the current market definition method shows 29 stations in the Charlottesville market, whereas using the Arbitron method would yield only 10 stations. To avoid such disparate results, the Arbitron/BIA method should be established as a “safe harbor” when a proposed merger is being considered. That is, no multiple ownership issue would be raised where (a) the number of stations in the radio market is determined by reference to the Arbitron data and the proposed transaction would result in the combined ownership of stations falling within the numerical limits of Section 73.3555 and (b) the transaction would meet the Commission’s “50/70” screen for revenue concentration as computed using BIA data. If the proposed transaction exceeded this “safe harbor,” future applicants would have the opportunity to show in specific cases why the Arbitron radio metropolitan area or BIA revenue figures should not be used and that some other criterion would be more realistic. That would provide a flexible policy for the analysis of proposed transactions.

Respectfully submitted,

**EURE COMMUNICATIONS, INC.**

[Filed and signed electronically]

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### **CERTIFICATE OF SERVICE**

I, Kelly Waltersdorf, a legal assistant in the law offices of Smithwick & Belendiuk, P.C., hereby certify that on March 27, 2002, copies of the foregoing Comments of Eure Communications, Inc., were sent via First Class Mail, postage pre-paid to the following:

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